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THE PROVINCE OF THE COURT IN JURY TRIAL.

ADDRESS OF HON. RICHARD E. BYRD, BEFORE THE STATE BAR ASSOCIATION, JULY 31ST, 1907.

In the Encyclopedia of Pleading and Practice it is stated that the office of an instruction to a jury is: "(1) To explain the issues; (2) to notice the positions taken by the parties and suggest, so far as the case may require, the principles of evidence and their application; (3) to declare what rules of law will apply to any state of facts which may be found on the evidence; (4) to exclude from the jury questions foreign to the case."

All of these several purposes are, by the cases sustaining each purpose, deemed of great importance. In the practice in this state, however, the third office alone has any place. Under the peculiar practice in Virginia, any reference to the evidence, or any prominence given to the evidence in an instruction, is deemed error. In Womack *v.* Zirkle, 29 Gratt. 192, it was held, that a trial court is not required to give the instructions generally on the law applicable to the case, even though the parties to the cause ask for it. And in Dejarnette's Case, 75 Va. 867, it was held, though not reversible error, to be bad practice for a trial court to instruct generally, but that the trial court should confine itself strictly to those instructions which are specific and which are tendered by the respective parties. If there is any good then to be obtained from the other purposes for which instructions are sought, under the practice in this state, parties are denied the benefit of it.

The system which now obtains in Virginia was fashioned under a practice which did not really require any other object than the one now subserved, and therefore under the conditions in which the practice had its inception, there was little loss by reason of the narrowness within which the purpose of the instructions was limited.

In all criminal cases it was formerly conceded that the jury had the advantage of the law and the fact. A dictum to this effect is found in Doss' Case, 1 Gratt. 569.

The dictum shows that from the highest court to the lowest, it was assumed as a conceded fact that an instruction by the court to the jury in a criminal case was only advisory. This same view found expression in Hurst Case, 11 W. Va. 54, in which the learned and able Judge Green also assumed it as a well-known and conceded theory of law.

The system of our courts prior to the war made such a view of the law and such a view of the province of the court practical. The principal nisi prius court before the war was the old county court which was presided over by men who were taken from the rank and file of the people. They were generally intelligent farmers who had never studied or practiced law. Strange to say, the court had jurisdiction both at law and in equity, both civil and criminal. It is certainly an anomaly of jurisprudence that a court should be presided over by men wholly unlearned in the law; and stranger than fiction is the fact that such a court served a great purpose in the development and advancement of the state. Its usefulness has been attested by able lawyers and great statesmen. Being a court, however, wholly unversed in law, it was natural, in the trial of every case, civil and criminal, that the lawyers should address the jury upon all questions of both law and fact. Law books were as frequently quoted from, in the address to the jury, as was the evidence submitted to the jury. The jury was composed mostly of the same material as the court, and the argument of the case was unlimited in time. After the lawyers on both sides had threshed out all the principles of law applicable to the case, and had quoted from the decisions of the higher courts and from approved text writers, to convince the jury not only that their view of the law was correct but of its application to the case in hand, it sometimes became the function of the court to decide between the attorneys upon their different contended theories of the law. The jury, having fully heard the argument, would appreciate the ruling of the court upon it in all its details and bearings. The court, therefore, was necessarily cautious in varying, except as required,

from the instructions tendered by the attorneys. A change in the language of the instruction might mean a different view of the law, no matter how immaterial the change might be. It was not necessary to instruct the jury, who had heard all the argument, upon any question except the one to which the attention of the court was directed. To give an instruction that had no application whatever to the evidence might seem to the untutored mind of the jury, who had heard the argument of the law as applicable to the evidence, as in some way bearing upon the evidence as given. To refuse to give an instruction, as asked for, might seem to the jury as taking a different view from the argument which the jury had heard upon the subject of the law. Besides, the court, being as untrained in grasping all the principles of the law as the jury, could not be expected to go into a full and analytic discussion of the various bearings of the evidence and the various principles of law which the case involved. Nothing could be more natural, then, than the system which was given birth to. The instruction was simply on a controverted point of law upon which the attorneys could not agree and called for the action of the court, and it carefully eliminated any reference to the weight, the sufficiency or the bearing of the evidence in the case.

When this anomalous tribunal went out of existence it was supplemented by an entirely new judicial system. The courts, under the new system, were presided over by judges supposedly learned in the law. It gradually went out of fashion to permit attorneys to bring their law books into court and to elaborate at length before the jury upon the principles of law for which they contended. This gradual process continued to develop until the present time when attorneys are no longer permitted to bring their reports of decided cases and their text books and read them to the jury and discuss before them the principles of law for which they contend. As the practice now is, the judge and the attorneys settle the instructions on the controverted points in a hearing from which the jury are carefully excluded. Instructions more or less numerous are framed, not to cover the full issues in the case, but only partial facts of the evidence. The jury are given no insight by any discussion had before them as to the whys and the wherefores, or the bearing of the several instruc-

tions, and often the instructions, although correct in every particular and applicable to every phase of the case, are more likely to confuse than to assist them. With a number of instructions put into their hands, upon the conclusion of the evidence, they obtain the first full opportunity to read and inspect them after they retire to the jury room, and after the conclusion of the argument in the case. No hint is permitted from the court as to why this instruction or that instruction is given. They must study that out unaided. No suggestion can be made as to the application of the evidence and of the force and character of the evidence which called for any particular instruction. And so, while the court may have granted an instruction based upon one feature of the case, the jury are left to ramble through all the contentions of the case to find out the particular feature to which the instruction is applicable.

It is readily seen that the practice which was the outgrowth of the system of courts prevailing in the state at the time of its adoption, has become entirely unsatisfactory and unsuited to the system of courts which the state has now adopted. An instruction in many cases does not instruct. It as often misleads as leads. There is no longer any reason for the very great jealousy with which the courts regarded the province of the jury. It is true that the court is the exclusive judge of the law and the jury the exclusive judge of the facts, in theory, and the theory in the main is a correct one. But in practical operation the court must necessarily pass upon the tendency of the proof which has been submitted to the jury.

First, the court passes upon the admissibility of testimony, and in doing so, frequently is called upon to pass upon the tendency, weight and sufficiency of evidence already introduced.

Second, in giving instructions, the court must pass upon the tendency of the evidence submitted, because it is error and of late has been decided to be reversible error, to give an instruction, however correct in the abstract, which is not applicable to the case.

Third, in passing upon motions for a new trial, the court passes directly upon the sufficiency of the testimony, and again in demurrers to evidence, the case is taken from the jury on questions of fact and submitted to the court.

Certainly nothing could be more unsatisfactory than the present system of giving instructions. Attorneys unload upon the trial court at the last moment pages of written instructions, some of them perhaps skillfully drawn for the purpose of tripping the court and some not intended for the jury but for the appellate court. The trial judge is then expected to rule with the same cold accuracy as the appellate court with the printed record before it, the oral arguments and printed briefs and as much time as it desires for consideration. This is manifestly impossible. Many a just verdict is lost because of some unguarded but wholly immaterial expression in an instruction upon some supposition that the jury might have been prejudicially affected thereby when in fact it had no weight whatever with the jury. A verdict will not only be set aside if an instruction is erroneous, but even if it is misleading. The exact limit to which it must be misleading has never yet been defined. That is resolved in the inner consciousness of an appellate tribunal wholly removed from the drama of the trial.

Until two years ago it was always required that a trial court should grant an instruction if there were a scintilla of evidence on which to rest a verdict. If there was no evidence upon which to rest a verdict, to give the instruction was error. If there were but a bare scintilla of evidence, it was error to refuse to give an instruction, and yet a jury would be more misled by an instruction as to which there was a scintilla of evidence with which to beguile them, than by instruction which had no application whatever to any evidence in the case.

Again, under the present practice, a trial may proceed for weeks; the court's business be arrested; the time and patience of the jury tried; the parties put to enormous expense, when the court is prepared to say at an early stage in the case, if it is permitted to do so, that a party has not made out a case, and that if the jury should return a verdict, it would be promptly set aside. Does the court any more invade the province of a jury when it tells the jury that if they find a verdict for one side, it will set aside the verdict, than it does when it does set aside the verdict after the verdict has been found? The abolition of the scintilla doctrine logically invited a direction of a verdict.

In West Virginia, by gradual and progressive steps, under its new system of courts, the law has proceeded to the length of permitting the court to direct the verdict. In this respect the court in fact does not invade the province of a jury. It takes as conceded every fact that the plaintiff has established, and it merely tells the jury what the law is as applicable to that state of facts. In our state the anomaly still continues, that an instruction must be concrete, and yet if it is so concrete as to be actually applicable, it becomes erroneous.

Another advantage to be obtained from permitting the court to direct the verdict is that it ends the litigation, while if the court merely sets aside the verdict, the whole trial must be rehad, often times reaching the same result. It has a great advantage over the demurrer to evidence. In a demurrer to evidence the judgment is absolutely conclusive. The trial lawyer may have been mistaken on the plain case, or in the necessary inferences and the application of the law to the facts. He demurs to the evidence and by the mistake he makes, he loses a perfectly just claim for his client. On the other hand, in making a motion to direct a verdict, if the court refuses to grant the motion, he may still go before the jury and the justice of his claim be made thoroughly plain.

There is no reason why under our present system, the practitioners in our court should not have the benefit of all the advantages to be derived from instructions, which the courts of other states possess. Take the first office as above stated to explain the issues. According to Blashfield, this is one of the most vital and necessary functions pertaining to instructions.

> "To have the jury determine for themselves what the issues are under the pleadings would be necessarily productive of great confusion and uncertainty. Jurors have no knowledge of law and are unfamiliar with the language in which it is expressed. Often judges, whose lives have been devoted to a study of the law, frequently find some difficulty in defining the issues, and it is not to be supposed that persons totally unlearned in the law can accomplish that which those who have made a life-long study of the subject find difficult of accomplishment."

Under the pleadings themselves there is often more than one

issue, and evidence is admissible under one issue which would not be admissible under another. Besides the direct issues involved in the litigation and in the pleadings, almost innumerable collateral issues spring up. The veracity of witnesses, their bias, and their opportunities to correctly testify are some instances. After a hotly contested case has been prolonged for several days, the untrained minds of the jurors become bewildered amidst the multiplicity of testimony that is introduced. It seems to be the extreme of folly that, with the court presided over by a judge learned in the law, whose experience for years has been to travel through the intricacies of a case, should not be called upon in a trial case to clearly and sharply define to the jury the exact points which they are called on to decide; to direct them what part of the evidence they are to discard after it has served its purpose in the case; and to point out to them the rules of evidence under which the testimony in the case becomes applicable to the real matter in controversy.

It may be that the jealousy with which the invasion of the jury by the court is regarded in this state arose from the fact that the old county justices were appointed by the governor upon the recommendation of their own body. It was a self-perpetuating body which came to us from pre-revolutionary times. Whatever the cause, however, the present judicial system should be free from any jealousy of this kind. The judge is directly responsible to the representatives of the people and is elected by them. Above the trial court sits an appellate bench which can correct any errors into which the trial court may fall. By a charge to the jury which directs their attention to the real matters in issue, the jury can be safely guided to a proper conclusion on all controverted questions. Under the present system of instructions, a verdict has to encounter the danger of being set aside, either because the instruction of the court is erroneous in law, or because it is misleading without being actually erroneous; either because it is ambiguous, or is too abstract, or is too concrete, or because of its phraseology, and for many other sins to which instructions are heir. We have developed a system of instruction law almost as artificial and inequitable as the old system of special pleading. In a charge to the jury many of these

difficulties would be removed, inasmuch as the appellate court could plainly see by the drift of the charge the significance of the instructions which is given or refused. Either side of course would have the right to except to any misdirection or non-direction by the court, the attention of the court having been called to the same.

The second use of an instruction might be as useful as that for which instructions are now granted. Without passing upon the weight of testimony, or its sufficiency, carefully advising the jury that they are the final arbiters of questions of fact, the court discusses with them the principles of evidence and their application to the respective positions taken by the parties. Of course such an instruction, according to our present practice, would be wholly erroneous. But by refusing to permit the judge to so instruct the jury, I contend that the parties litigant lose the great benefit of the experience of the court. Instead of having a clear, unambiguous, impartial statement to the jury of the issues which they are called on to try, of the positions taken by the several parties, and the tendency of the evidence in support of these positions, and excluding from their consideration all matters which have crept into the testimony foreign to the issues, we now have principles of law laid down upon such features of the case as counsel may choose to request. They must necessarily give to the jury a very confused conception of the matter in controversy. The jury find principles of law laid down to them upon this or that question which arises in the evidence, often without any order except that which is arranged by counsel, each instruction in itself isolated and to be applied to only a given view of the case, and the jury find themselves more embarrassed by what they shall do with the instructions and what significance the instructions have than they derive from any benefit from them.

The practice of instructions in the courts in this state, I think, is undergoing a transition period. The absurdities of the old system of instructions practicable enough in the inception of the system, but now very impracticable, are now being perceived by the courts of last resort in this state. A transition state is now in progress. The courts find themselves compelled to gradually

develop the province of the court in the direction which is now prevalent in most states, and yet they are hampered by the inhospitality of the common law to the suggestions of common sense.

It seems to me that this evolution can be aided by proper legislation. Let a law be enacted which will not only give full power to the court to charge the jury upon the matters in issue, but even to direct a verdict when a contrary verdict would be set aside for insufficiency of evidence. Let the demurrer to evidence either be abolished or restored to its common-law use. I believe that the demurrer to evidence has been greatly abused. It has really come to take the place of a distorted direction to find a verdict. It has none of the advantages of a direction to find a verdict and it has all its disadvantages. It gives the power to the court to take the case from the jury without any power of having the case remanded to the jury, though it may have been improperly taken from the jury. Legislation by which the court may properly direct the attention of a jury to the proper issues in the case will do away with much of the cause of complaint because of the number of verdicts that are set aside by the appellate court, and if it does not absolutely eliminate a reversal of a verdict merely because an instruction is apparently misleading, it will go a long way to correct such evils. An instruction would hardly be considered misleading and therefore a verdict based on it presumably erroneous, when in the charge to the jury, the court will point out the application which the jury is to make of the instruction. I consider that we have too many reversals of righteous verdicts for immaterial causes; and the greatest source of reversals is because the instruction dead line is shifting and uncertain and the refinement of criticism which seems to be a necessary incident to the system in vogue too often results in practical hardship and injustice.

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